TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 56.

RICHARD H. FLETCHER, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND POTOMAC RAILROAD COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 24, 1895.

(16,006.)

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 22, 1897.

1 In the Court of Appeals of the District of Columbia.

RICHARD H. FLETCHER, Appellant,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } No. 438.

Supreme Court of the District of Columbia.

RICHARD H. FLETCHER
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } Law. No. 32581.

UNITED STATES OF AMERICA, }
District of Columbia, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed April 4, 1891.

In the Supreme Court of the District of Columbia.

RICHARD H. FLETCHER
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } Law. No. 31581.

The plaintiff, Richard H. Fletcher, sues the defendant, The Baltimore and Potomac Railroad Company, a corporation having an office and doing business in the District of Columbia, for that heretofore, to wit, on the 16th day of May, A. D. 1890, at the city of Washington, in the District of Columbia, the plaintiff, while peaceably and lawfully on the public streets, to wit, on South Capitol street near the corner of Virginia avenue, in said city and District, was, by and through the carelessness and negligence of the defendant, its servants and agents, violently struck in the left inguinal region of the body with a large and heavy piece of timber carelessly and negligently thrown by one of the defendant's servants from one of the cars of the defendants, whereby the plaintiff was greatly bruised and seriously and permanently injured, and was caused to suffer great pain, and he has ever since been and still is suffering pain therefrom, insomuch as to be unable to properly attend to his ac-

2 customed occupation and duties without great pain and suffering; that he has lost in consequence of said injury a great deal of time from his daily work, and his power and ability to pursue his occupation and to earn a livelihood for himself and family have been greatly and permanently lessened and his health and comfort greatly impaired and affected, and he has been compelled to expend large sums of money in the employment of a physician and for medicines and surgical appliances rendered necessary by his said *necessaries*, whereby and by reason of the aforesaid wrongs and injuries resulting as aforesaid from the carelessness of the defendant, its servants and agents, the plaintiff has suffered great damage, to wit, the sum of ten thousand dollars ($10,00–), which sum the plaintiff claims, besides costs.

FRANKLIN H. MACKEY,
Attorney for Plaintiff.

The defendant is to plead hereto on or before the first day of the first special term of the court occurring twenty days after service hereof; otherwise judgment.

FRANKLIN H. MACKEY,
Attorney for Plaintiff.

Plea.

Filed May 8, 1891.

In the Supreme Court of the District of Columbia.

RICHARD H. FLETCHER
vs.
BALTIMORE AND POTOMAC RAILROAD COMPANY. } At Law. No. 31581.

Plea.

And now comes the said defendant and for plea says that it is not guilty in manner and form as plaintiff hath alleged.

ENOCH TOTTEN,
Att'y for Defendant.

Joinder of Issue.

Filed May 9, 1891.

In the Supreme Court of the District of Columbia.

RICHARD H. FLETCHER
vs.
BALTIMORE AND POTOMAC RAILROAD COMPANY. } At Law. No. 31581.

The plaintiff hereby joins issue on the defendant's plea.

FRANKLIN H. MACKEY,
Att'y for Plaintiff.

SATURDAY, *December* 22, 1894.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

3 RICHARD H. FLETCHER, Plaintiff,
vs.
BALTIMORE AND POTOMAC RAILROAD COMPANY, Defendant. } At Law. No. 31581.

This cause coming on to be heard upon the plaintiff's motion for a new trial, and the same having been heard is overruled. Therefore it is considered that the plaintiff take nothing by his suit, and that the defendant go thereof without day and recover against said plaintiff its costs of defense, to be taxed by the clerk, and have execution thereof. Whereupon the plaintiff notes an appeal to the Court of Appeals.

* * * * * * *

MONDAY, *December* 31*st*, 1894.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

RICHARD H. FLETCHER, Plaintiff,
v.
THE BALTIMORE AND POTOMAC R. R. Co., Defendant. } At Law. No. 31581.

* * * * * * *

In the above-entitled causes it is ordered that the present October term, 1894, be, and it is hereby, prolonged not to exceed thirty days for the purpose of settling bills of exceptions.

1895, January 3.—Bond for appeal filed.

Order for Appeal & Citation.

Filed January 5, 1895.

In the Supreme Court of the District of Columbia, the 5 Day of Jan'y, 1895.

RICHARD H. FLETCHER
vs.
BALTIMORE & POTOMAC R. R. Co. } At Law. No. 31581.

The clerk of said court will enter an appeal from the order of the court overruling the motion for a new trial and issue citation to the defendant.

FRANKLIN H. MACKEY,
Attorney for Plaintiff.

4 In the Supreme Court of the District of Columbia.

RICHARD H. FLETCHER
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } At Law. No. 31581.

The President of the United States to the Baltimore and Potomac Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia on the 5th day of January, 1895, wherein Richard H. Fletcher is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 5th day of January, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 9th day of February, 1895.

ENOCH TOTTEN,
Attorney for Appellee.

(Endorsed:) No. 31581. Law. Richard H. Fletcher *vs.* Baltimore and Potomac Railroad Co. Citation. Issued January 5, 1895. Served copy of the within citation on —— ——. —— ——, marshal. F. H. Mackey, attorney for appellant.

Bill of Exceptions.

Filed January 24, 1895.

In the Supreme Court of the District of Columbia.

RICHARD FLETCHER
vs.
THE BALTIMORE AND POTOMAC RAILROAD. } Law. No. 31581.

Bill of exceptions.

Be it remembered that on the trial of this cause before the Hon. Justice Bradley and a jury on the 6th day of December, 1894, the plaintiff, testifying in his own behalf, gave evidence tending to prove that he was the plaintiff in the case; that on the 16th day of May, 1890, he was working at the workshops of the defendant and had finished his day's work at about a quarter to six in the evening,

5 He then started for home. When he came to South Capitol street and Virginia avenue he stopped to see if he could see any of the workmen coming, in order to have company on his way home. He was standing on the pavement, on the south side of the railroad track. The track ran down the middle of Virginia avenue. As he was standing there, one of the defendant's work trains passed by, going, as witness supposed, about 20 miles an hour. These were open flat cars. There were a number of workmen on the cars returning from their day's work down the road and going home. One of them threw from the car, just as it was passing plaintiff, a stick of bridge timber six inches square and about six feet long. It struck the ground and, rebounding, the end of it struck plaintiff in the region of the groin; that he suffered greatly from the injury, being confined to his house for about 32 days. When he got so that he could go out he did what work he could, but has never been able to do the hard work that he could do before the injury. Every now and then he has to lose a day or two on account of his disability. When he works hard it causes him great pain in the region of the groin. He suffered a great deal of pain at night. Some nights he hardly gets a half hour's sleep from the pain. Before the accident he weighed 170-odd pounds and now weighs 154; has had physician's attendance; has worn pads and a truss, by the direction of his physician; wore the truss for over a year. Plaintiff's wages at the time of the accident were 15 cents an hour; has earned as much as $50.25 a month. He was suffering with pains from the injury now (at the trial); suffers more from it now than he did a year ago.

Dr. Hamilton P. Howard, called in behalf the plaintiff, gave evidence tending to show that he was a physician; had treated plaintiff professionally; examined the plaintiff physically about the middle of January, 1894, and another examination about three weeks ago. Plaintiff showed great soreness about the region of the groin. There was also pronounced soreness of the testicle and along the spermatic cord and an apparent tenderness down the limb to the knee and an exaggerated condition of the nervous reflex. If the plaintiff has received a blow in the region of the groin from a stick of timber about five feet long and five or six inches square thrown from a rapidly moving car witness would attribute the condition of the plaintiff to the blow. Considering the age of the plaintiff, the length of time he has been injured, his physical condition before the injury and what it is now, witness did not think plaintiff would ever recover.

Cyrus Hall, a witness called on behalf of the plaintiff, gave evidence tending to prove that he was in the employ of the defendant company on the 16th of May, 1890; that he worked with the repairmen on the defendant's road; that he lived in Alexandria; went down on the dirt trains or repair trains in the morning to the points where repairs were needed, and returned in the evening about 5 or 6 o'clock. On the day in question he and the men were working somewhere down the road near Quantico. He got off the train

6 at his home that night and did not know anything about the accident until next morning, when he and the other workmen were notified by the captain in charge of the gang that they should not throw any more wood from the train while it was in motion. Witness had been working for the company at this business about two and a half years; has seen timber thrown off the train by workmen after the train got into town. Witness further testified as follows: "We had been throwing off timber all the time, more or less. When we were coming in at and near points to our homes we would heave it off the train while it was going along slow; it was wood to cook our grub; we were told not to hurt anybody, but we never had been notified thoroughly by the railroad company not to throw it off. This throwing of wood by the workmen from the cars while in motion has been so often done that I never took any particular account of the number of times. I have thrown off some and I have seen a *nother* of others throw off some. It has been done time and again, and there was never any objection that I knew of until that time. Sometimes the wood that was thrown off was little pieces of stick- of pine; sometimes old rotten ties, according to what he could get hold of. We always threw them off the train nearest to the closest point to our homes to carry home or to have some one to carry them for us. I have seen Wood thrown off in Alexandria and in Washington—that is, when the cars were passing through. I have seen it often. I have thrown off pieces for myself and thrown it off for other men, both in Alexandria and in Washington. When I threw it off the car was always moving along; I suppose 4 to 3 miles an hour. We tried not to hurt people. We would always look out and see that we did not hit anybody. I never did hit anybody. The car was not going so fast. It was wood that he had picked up for firewood—old pieces of plank—and whatever we could get hold of."

On cross-examination witness testified that he had thrown off wood in Washington for himself and others 4 or 5 or maybe 8 or 10 times, and further gave evidence as follows:

Q. Did you not have orders not to throw things off the moving train?

A. No, sir; we did not have any orders as I know anything about. We didn't have no particular orders by the captain not to do it before the morning that the accident happened. Ab. Anderson, a kind of foreman of the workmen, told us to be careful not to hurt any one.

WILLIAM JOHNSON, called in behalf of the plaintiff, gave evidence tending to show that he was employed by the defendant company as a repairman on the road; that he was on the car at the time this piece of timber was thrown off. It was in the evening, about 6 o'clock. One of the workmen by the name of George Washington threw it off. Witness had been in the employ of the road about 8 or 9 years; had seen pieces of timber thrown by the workmen from the work-train when in motion, and within the limits of the city, by

7 the workmen upon it; has seen it done quite often, but how many times is unable to tell; never knew of any order of the company prohibiting it from being done until after this accident happened; the practice of throwing timber off by the workmen continued all the time witness was on the road; they had been doing it when he went there and continued doing it; could not tell how fast the train was going; it was going pretty slow; he used to throw it off in Alexandria and in Washington; the train was going tolerably fast when Mr. Fletcher was hurt, but how fast he could not tell; the piece of timber was a square piece of timber about four feet long, he guessed; he didn't measure it; he was about three cars away from the stick of timber when it was thrown off.

Said Johnson, on cross-examination, was asked where the greater number of men employed on this work-train lived, and answered "the biggest portion of them lived in Alexandria," and further testified that the pieces of wood were generally thrown off in Alexandria and there was not much thrown off in Washington, "because the men who lived in Washington lived a good ways from the railroad and didn't often bring any wood up here."

THOMAS COLEMAN gave evidence on behalf of the plaintiff tending to show that he lived in Alexandria; that he was an employee of the defendant company; worked on these work-trains that have been described here for nearly two years; has seen pieces of timber thrown from the work-trains lots of times. In answer to the question, "Have you ever seen pieces of timber thrown from the work-trains in the city limits here when the car was in motion," witness replied, "I have seen these fellows throw off wood all along the road around here, in Alexandria and Washington too. We had never been prohibited from doing that;" never heard of any of the men being prohibited from throwing timber off; does not know that they did it on the sly. The train, when they passed through Washington, was not going very fast in the city limits. The men used to watch a chance to throw off the wood. Witness means by that that they were watching to keep from hurting any one. They would catch hold of the side of the car and drop it like. The cars were flat cars.

Said Coleman, on cross-examination, testified that about two-thirds of the workmen on this train lived in Alexandria, and that the men would throw off wood sometimes 3, 4, and 5 times a week, whenever they could get a piece.

EDWARD NOBLE gave evidence in behalf of the plaintiff tending to show that he was in the employ of the defendant company in May, 1890, engaged on a work-train that has been described here; had been in the employ of the road some 20-odd years, off and on; has seen pieces of timber thrown by the workmen on that train from the car while the train was in the city limits and in motion; it was frequently done; could not say how often; it was frequently done. The practice continued, so far as witness knew, ever since the train has been run on the road

8 Witness has done it; was never prohibited from doing it until after Mr. Fletcher got hurt; never heard of anybody else having been prohibited. The train was going about as fast as a man could run. Witness threw off the timber from the train for firewood for himself to save him from buying it; has seen it thrown off both in Washington and in Alexandria. He had thrown it off in Alexandria and in Washington both, for men that lived there. Witness was on the train when this accident occurred, but did not see it happen; did not know who threw the stick off "more than what he heard." The men on the train used to say, "You want to be careful when you throw the wood off and don't hit nobody." Ab. Anderson, the foreman of the gang, used to say it and sometimes the rest of the men said it.

Said Noble, on cross-examidation, testified that he himself had thrown off wood for men living in both Washington and Alexandria probably a dozen times, more or less, in ten years; that during this time the train came to Washington sometimes 4 or 5 times a week and sometimes every day, and that over two-thirds of the men employed on the train lived in Alexandria.

JOHN DOUGLASS, a witness called in behalf of the plaintiff, gave evidence tending to show that he resides in Alexandria; that he was working for the defendant in May, 1890; was working on this work-train; has seen pieces of timber such as have been described here thrown from the car of this work-train by the workmen while the train was in motion, in the city limits here: has seen it pitched off—blocks, pieces of wood, or whatever they could pick up; could not remember the number of times that he had seen them: it was whenever the men could get any they would bring it over; if they were working and had the chance to get any they would pick it up and bring it over here. The practice continued all the time he was on the road. He was on the road about 6 months—from June 1889, to January, 1890, and went on again the next season. He was never prohibited from throwing any wood and never heard any of the other workmen prohibited. Ab. Anderson, the foreman of the gang, used to tell him, "When you throw it off don't hit anybody." This wood that was thrown off was wood that they picked up down on the road; it was sometimes old pieces of ties; sometimes blocks, where they had been working on a bridge and had pieces of stuff left over; sometimes they would unload bridge timber and they would pull out the standards and keep them; has thrown off blocks in Washington "for fellows on the train."

Said Douglass, on recross-examination, was asked how many of the men employed on this work-train lived in Alexandria and answered, "Pretty nearly all of them: 6 or 7 of them were from Washington," and further testified that he dropped off wood once or twice in Washington for men on the train.

WILLIAM A. LYONS, a witness called in behalf of the plaintiff, gave evidence tending to show that he had known the plain-

9 tiff constantly since 1863 or 1864; that prior to May, 1890, witness always knew plaintiff as perfectly hearty and strong in all the working he had ever done with him, and they had worked together pretty near ever since they had been large enough to work; that since the accident in question he had worked with witness several times and he, plaintiff, wasn't able to do a good day's work, or at least he complained and said he couldn't do it. For instance, winding at a well, handling pumps, &c. His, plaintiff's, appearance since the accident is altogether different. He is nothing like the fleshy man that he was before he was hurt.

CHARLES H. BUTLER, a witness called in behalf of the plaintiff, gave evidence tending to show that before the accident in question plaintiff was a strong, hearty man, able to do almost any kind of manly labor. Witness had worked with him and never knew him to fail in any kind of hard labor before that time. Since that time he had worked with witness some. Witness is a carpenter and contractor and has hired plaintiff to do work along with him. Witness couldn't pay him as much wages as he did the others on account of his not being able to do the same work.

The plaintiff here rested his case. Whereupon the defendant, by its attorney, moved the court to direct the jury to find for the defendant; which motion, after argument, the court over the objection of the plaintiff, granted and accordingly instructed the jury that upon the whole case the plaintiff was not entitled to recover, and to return a verdict for the defendant; to which instruction the plaintiff, before the case was given to the jury, excepted and prayed the court to note said exception upon its minutes, which was done. Thereupon, the case being given to the jury, a verdict was rendered for the defendant in accordance with said instructions. Wherefore the plaintiff having prayed the court to sign this his bill of exceptions the same is accordingly done this 24th day of January, A. D. 1895, now for then.

A. C. BRADLEY, *Justice.* [SEAL.]

Settled by counsel this 23rd day — January, 1895.

ENOCH TOTTEN,
For Defendant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing are true copies of originals in cause No. 32581 at law, wherein Richard H. Fletcher is plaintiff and The Baltimore and Potomac Railroad Company is defendant, as the same remain upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

10 In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 19th day of February, A. D. 1895.

JOHN R. YOUNG,
Clerk Supreme Court, District of Columbia.

Endorsed on cover: District of Columbia supreme court. No. 438. Richard H. Fletcher, appellant, *vs.* The Baltimore and Potomac Railroad Company. Court of Appeals, District of Columbia. Filed Feb. 25, 1895. Robert Willett, clerk.

11 FRIDAY, *April 19th*, 1895.

RICHARD H. FLETCHER, Appellant,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } No. 438.

The argument in the above entitled cause was commenced by Mr. F. H. Mackey, attorney for the appellant, and was continued by Mr. W. H. Dennis, attorney for the appellee, and was concluded by Mr. F. H. Mackey, attorney for the appellant.

12 RICHARD H. FLETCHER, Appellant,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } No. 438.

Opinion of Court.

Mr. Chief Justice ALVEY delivered the opinion of the court:

This is an action brought by the appellant against the appellee to recover damages for injuries received by the former, occasioned, as alleged, "by and through the carelessness and negligence of the defendant, its servants and agents," &c. The general issue plea of not guilty was pleaded by the defendant, and there were verdict and judgment for the defendant, and the plaintiff has appealed.

The material facts of the case are briefly, but very clearly and fairly stated, in the brief of counsel for the plaintiff, and which statement we shall adopt, with but slight addition or variation.

The evidence, as set forth in the bill of exception, tends to prove that the defendant is a railroad company, operating a railroad from and through the city of Washington, and as such was in the daily habit, for eight or ten years or more, of running every morning out of Washington and Alexandria, a repair train of open flat cars loaded with its employees; that this train returned every evening about six o'clock, bringing the workmen back to their homes; that these men were allowed the privilege of bringing back with them, for their own individual use as firewood, sticks of refuse timber left over from their work after repairing the road, such as old pieces of bridge timber, old cross-ties, etc.; that it was the constant and daily habit of the men during all these years to throw off these pieces of

firewood while the train was in motion at such points on the road as was nearest their homes, where it was picked up and carried off by some member of their families, or other person waiting there for it. The only caution given the men was "that they should be careful not to hurt any one in throwing it off." This instruction was given by the foreman of the gang. On the 16th of May, 1890, the plaintiff was working at the workshops of the defendant; and he had finished his work for the day at about a quarter of six in the evening, and had started for home. When he reached the intersection of South Capitol street and Virginia avenue "he stopped to see if he could see any of the workmen coming, in order to have company on his way home; he was standing on the pavement on the south side of the railroad track,"—the track being in the middle of Virginia avenue. While standing there the repair train passed on its return from work for the day. It was moving more or less rapidly according to the testimony of the various witnesses. One of the workmen aboard the train threw from the car in which he was standing, and just as it was passing the plaintiff, a stick of bridge timber six inches square and about six feet long. It struck the ground and, rebounding, the end of it struck the plaintiff in the region of the groin, and seriously injured him, so much so that he has never been the able-bodied man that he was before the accident. The morning after the plaintiff was injured orders were issued by the company that the men should throw off no more wood while the train was in motion. These facts being given in evidence to the jury, the court, upon motion of the defendant's attorney, directed a verdict for the defendant, which was accordingly rendered, and this ruling of the court constitutes the only assignment of error.

On this single assignment of error the question is, whether the facts disclosed such case of negligence on the part of the defendant as entitled the plaintiff to recover; for if, conceding the truth of the testimony, and all fair inferences deducible therefrom, the court could not perceive that there was rational ground upon which to base a verdict for the plaintiff, it was its duty to direct a verdict for the defendant, and not to subject the case to groundless and unrestrained speculation by the jury, as to the liability of the defendant, on insufficient proof.

In what, then, did the supposed negligence of the defendant consist? The defendant was not in the exercise of its ordinary business of common carrier, and the plaintiff bore no such relation to it as that of passenger. He stood simply in the relation to the defendant of a stranger rightfully on the public way or street. Nor was the relation of master and servant existing at the time of the accident, as to the running and conduct of the repair train, as between the defendant and the day laborers, who were allowed to ride home on the train after finishing their day's work. There is nothing in the evidence to show upon what terms or conditions the men were allowed to ride upon the train to and from their work, as in
the case of Vick *v.* N. Y. Central R. R. Co., 95 N. Y. 267, and
13 the other cases cited. It is not contended that there was negligence in the humane indulgence of allowing the laborer

the privilege of bringing in on the train the refuse wood or timber gathered up along the road, to be used as fuel. Assuming knowledge on the part of the defendant, the only act of which negligence could be predicated was in allowing the men to drop or throw off from the moving train along the street, the wood brought in by them, to be taken to their homes for fuel. This, as the evidence shows, had been a practice indulged for several years, and there had never been an accident resulting therefrom before, and there had been no complaint of the habit either by the police of the city or by others; at least there is no evidence of such complaint. Under the circumstances, we do not think the mere allowing the wood to be thrown from the moving train was culpable negligence on the part of the defendant, *per se*; though, of course, the manner of throwing off the wood in a particular instance might constitute negligence. The person who threw off the piece of wood that injured the plaintiff was not in the performance of any duty required of him by the defendant, but his act was wholly independent of any duty imposed upon him by his employment to work for the defendant. In other words, his act was not within any limit or scope of authority derived from the defendant, as agent or servant in the performance of duty. If the injury was not one of pure accident, but was the result of negligence in the manner of throwing off the log, the party doing the act would be responsible therefor. It would certainly be exceedingly hard to hold the defendant company responsible, and to do so would seem to be justified by no well-settled principle of law.

There are not many cases to be found in the books that have any direct bearing upon the facts of this case. But we think the case of Walton *v.* New York Central Sleeping Car Co., 139 Mass., 556, has a close analogy to it, and in principle goes far in the direction, if not quite to the extent, of being decisive of this case.

In that case the plaintiff was in the employ of the B. & A. Railroad Company, as a laborer and track repairer, and, on the day of the injury received, was, under the direction of the railroad company, rightfully on its tracks, engaged in the performance of his duties, and in the exercise of due care, when an express train passed rapidly by, on an adjoining track, and a bundle thrown from the passing train hit the plaintiff, and caused the injuries complained of. In this express train was a parlor car, owned by the defendant, the sleeping car company, carried on special terms. The defendant employed on the car a conductor, who collected the fares for seats, and had general charge and management of the car; and a porter, one Maxwell, whose business it was to take charge of the car, keep it clean and in order, serve the passengers, and remove rubbish from the car, and who was under the conductor. He was allowed by the defendant to bring in, and keep in a closet in the car, where articles of the defendant were also kept, a satchel and other articles of his own, to which closet he had a key. As this car was passing through Newton on the day of the accident, Maxwell went out upon the platform of this car, and threw off a paper bundle containing soiled clothing belonging to himself, together with a paper box con-

taining some articles of his own. It appears that Maxwell, the evening before, had arranged with a woman, living near by, to throw the bundle at this point from the train, so that she could get it and to wash the soiled linen. This bundle so thrown struck the plaintiff and inflicted the injury. Maxwell had never thrown a bundle in that way before. He had no duty in regard to the washing of the linen used in the car, which was washed in Boston, and attended to by other servants than Maxwell. Maxwell testified that no person directed him to throw off the bundle, and that he threw it off for his own convenience solely.

The plaintiff asked the trial judge to rule that, on the facts stated, he was entitled to recover. But the judge refused so to rule, and, instead thereof, ruled as follows:

"The defendant is not responsible, if the injury to the plaintiff was done by Maxwell, the servant of the defendant, without the authority of the defendant, and not for the purpose of executing the defendant's orders, or doing the defendant's work, and not while acting as such servant, in the scope of his employment. If Maxwell was employed by the defendant as a porter upon its parlor car, and, wholly for a purpose of his own, and disregarding the object for which he was employed, and not intending by his act to execute it, negligently threw a bundle, his own property, from the platform of the parlor car, and thereby the plaintiff, who was not a passenger, was hit and injured while in the exercise of due care, and if this injury was done by Maxwell not within the scope of his employment, then the defendant is not liable. If, however, Maxwell negligently threw the bundle in the execution of the authority given him by the defendant, and for the purpose of performing what the defendant had directed, or if the injury to the plaintiff was done by Maxwell while acting within the scope of his employment, then the defendant would be liable."

The judge also ruled, that, upon the whole evidence, the plaintiff was not entitled to recover. And upon a review by the supreme court of the State, it was held that these rulings were correct; and in a brief opinion by the supreme court, it was said:

"The rulings and instructions of the court were correct. There was no evidence that Maxwell was employed by the defendant to take care of his own clothing and personal effects. The act complained of was not within the scope of his employment; and it is wholly immaterial that he was, at the moment, riding in a car of the defendant in which he was employed by it for other purposes."

That case, it seems to us, was rightly decided, and decided upon principle that is applicable here. If the owner of the parlor or sleeping car in that case was properly exempt from liability, it is difficult to perceive why, or upon what principle, the defendant in this case should be held liable.

The case mostly relied upon by the plaintiff is the case of Snow
14 v. Fitchburg R. Co., 135 Mass., 552. But that case presents features quite distinguishable from the case before us. There the plaintiff was a passenger on the defendant's road; and while waiting in a proper place and using due care, on the platform

at the station of the defendant, to make a necessary change from one train to another, the plaintiff was struck and injured by a mail bag thrown from a rapidly passing train by a United States mail agent. And, as declared by the court, "there was evidence in the case tending to show that mail bags had not unfrequently been thrown from that car, in such a way as to strike upon the platform where the plaintiff stood; and if such evidence was believed, the court was justified in inferring that the defendant knew, or, in the exercise of proper care, ought to have known this." That, therefore, was simply a negligent and dangerous manner of performing a duty owing to a passenger by a railroad company. The company was bound to exercise towards the plaintiff in that case, "such care and diligence as could reasonably be exercised to protect her from such injuries as human foresight could anticipate and prevent." And though the mail bag was thrown out by the United States mail agent, yet it was the duty of the railroad company to provide for and see to the safe and proper delivery of the mail bag from the train, so that it should not imperil the life or limbs of the passengers on its trains. That case, we think, does not in any manner control in the decision of the present case.

We are of opinion that the court below, upon the facts before it, was correct in directing the verdict for the defendant; and the judgment must therefore be affirmed.

Judgment affirmed.

15 MONDAY, *June 3rd, A. D.* 1895.

RICHARD H. FLETCHER, Appellant.
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } No. 438. April Term, 1895.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per Mr. CHIEF JUSTICE ALVEY.

June 3, 1895.

MONDAY, *June 17th, A. D.* 1895.

RICHARD H. FLETCHER, Appellant,
vs.
THE BALTIMORE AND POTOMAC RAILROAD COMPANY. } No. 438.

On motion of Mr. F. H. Mackey, attorney for the appellant in the above-entitled cause, it is ordered that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

16 Know all men by these presents that we, Richard H. Fletcher, as principal, and James P. Nalls, as surety, are held and firmly bound unto The Baltimore and Potomac Railroad Company in the full and just sum of three hundred dollars, to be paid to the said The Baltimore and Potomac Railroad Company or its certain attorney or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of July, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between Richard H. Fletcher, appellant, and The Baltimore and Potomac Railroad Company, appellee, a judgment was rendered against the said Richard H. Fletcher, and the said Richard H. Fletcher having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said The Baltimore and Potomac Railroad Company citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Richard H. Fletcher shall prosecute said writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

RICHARD H. FLETCHER. [SEAL.]
J. P. NALLS. [SEAL.]

Sealed and delivered in the presence of—
FRANKLIN H. MACKEY.

Approved by—
R. H. ALVEY,
Chief Justice.

This is satisfactory.

ENOCH TOTTEN,
For Def't in Error.

[Endorsed:] No. 438. Richard H. Fletcher, appellant, *vs.* The Baltimore & Potomac Railroad Co. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jul-23, 1895. Robert Willett, clerk.

17 UNITED STATES OF AMERICA, *ss:*

To the Baltimore and Potomac Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein

Richard H. Fletcher is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 23d day of July, in the year of our Lord one thousand eight hundred and ninety-five.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Due service of the above citation admitted this 23d of July, 1895.

ENOCH TOTTEN,
For B. & P. R. R. Co.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jul 23, 1895. Robert Willett, clerk.

18 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between Richard H. Fletcher, appellant, and The Baltimore and Potomac Railroad Company, appellee, a manifest error hath happened to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal Court of Appeals, District of Columbia.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of July, in the year of our Lord one thousand eight hundred and ninety-five.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

19 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 18, inclusive, contain a full and correct copy of the transcript of record and proceedings of said Court of Appeals in the case of Richard H. Fletcher, appellant, *vs.* The Baltimore and Potomac Railroad Company, No. 438, April term, 1895, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 27th day of July, A. D. 1895.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,006. District of Columbia Court of Appeals. Term No., 56. Richard H. Fletcher, plaintiff in error, *vs.* The Baltimore and Potomac Railroad Company. Filed August 24, 1895.